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Scrutiny of Westminster statutory instruments in devolved areas

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1 Introduction

This briefing paper has been prepared following a request from the Assembly & Executive Review Committee (AERC). The committee asked for information on the arrangements for the scrutiny of applicable statutory instruments (SIs) in the Scottish Parliament and Senedd (Welsh Parliament).

In the context of this research, applicable statutory instruments refers to subordinate/delegated legislation conceived and passed in Westminster that impinges on devolved matters.

The Northern Ireland Assembly has no formal arrangements in place for the scrutiny of these statutory instruments.

A scoping paper prepared by the committee secretariat and presented to AERC largely sets out the processes for scrutiny of Westminster SIs in the Scottish Parliament and Senedd. This briefing paper therefore seeks to complement that scoping paper by providing additional information where possible and appropriate.

2 Statutory instruments

Statutory instruments are a type of delegated legislation, which is the “most common form of legislation in the UK.”¹ Delegated legislation is also known as secondary or subordinate legislation.

UK Statutory Instruments are “are normally, but not always, made by a UK Government Minister; some are made by Government agencies, such as HMRC.”²

The delegated legislation landscape is complex, as the Hansard Society’s explainer *Delegated Legislation What types are there, and how are they made?*

¹ Hansard Society, Delegated Legislation: What types are there, and how are they made?, December 2023: <https://www.hansardsociety.org.uk/publications/delegated-legislation-what-types-are-there-and-how-are-they-made>

² As above

demonstrates.³ However, the two most common methods of introducing statutory instruments are the **affirmative** procedure and **negative** procedure:

- An SI laid under the **affirmative** procedure must be actively approved by both Houses of Parliament. Certain SIs on financial matters are only considered by the Commons.
- An SI laid under the **negative** procedure becomes law on the day the Minister signs it and automatically remains law unless a motion – or ‘prayer’ – to reject it is agreed by either House within 40 sitting days. Certain SIs on financial matters are only considered by the Commons.

3 Scottish Parliament

The current process in the Scottish Parliament for the scrutiny of applicable Westminster SIs has its origins in the UK’s withdrawal from the European Union.

Previous research sets out how the Scottish Parliament developed new processes to address the reality of the UK no longer being subject to EU law:

The UK formally left the European Union (EU) at 11pm on 31 January 2020 (“Exit Day”), and entered a transition period until 31 December 2020 (“IP Completion Day”). Thereafter, EU law was no longer binding on the UK as an international source of law, and was replaced by a domestic equivalent, known as “retained EU law”. One of the questions which arose prior to IP Completion Day was how to correct retained EU law in advance of it taking effect, so that it would operate effectively and avoid a so-called “cliff-edge scenario”. Most of these corrections were made using delegated legislation by the UK Government. This was typically done with the consent of the devolved administrations where retained EU law included policy areas within the devolved competences. In Scotland, new processes were introduced to provide

³ See footnote 1

the Scottish Parliament with an opportunity to approve such consent being given by the Scottish Government.⁴

Section 8 of the European Union (Withdrawal) Act 2018 “empowered UK Ministers to make delegated legislation in the form of UK Statutory Instruments (SIs) where they considered it appropriate “to prevent, remedy or mitigate ... any failure of retained EU law to operate effectively, or ... any deficiency in retained EU law ... arising from the withdrawal of the United Kingdom from the EU.”⁵

Although the UK Government was not obliged to seek the consent of the devolved administrations in relation to delegated legislation, it nevertheless in 2017 committed that it would “not normally use the power to amend domestic legislation in areas of devolved competences without the agreement of the relevant devolved authority”.⁶ This was reiterated in 2018 when the UK Government stated: “[i]n any event, the powers will not be used to enact new policy in devolved areas; the primary purpose of using such powers will be administrative efficiency.”⁷

There was, however, a scrutiny gap where the Scottish Parliament was concerned, so the Parliament and Scottish Government approved a protocol that would allow the Scottish Parliament to approve the Scottish Government giving its consent to the UK Government.

This protocol, also known as Protocol 1, was agreed on 11 September 2018 and allowed for the following arrangement:

Under this Protocol, the Scottish Government would agree with the UK Government that a UK SI should be made under section 8 of the 2018

⁴ Taylor & Wilson, Legislating for a Post-Brexit Scotland: Scottish Parliamentary Scrutiny of UK Statutory Instruments on Retained EU Law, *Edinburgh Law Review*, vol.27 No.1, January 2023: <https://www.eupublishing.com/doi/10.3366/elr.2023.0809>

⁵ As above

⁶ Department for Exiting the European Union, Bill Memorandum on European Union (Withdrawal) Bill Memorandum concerning the Delegated Powers in the Bill for the Delegated Powers and Regulatory Reform Committee, 2017

⁷ Cabinet Office, Report on Intergovernmental Agreement on the European Union (Withdrawal) Bill and the Establishment of Common Frameworks, 2018

Act to address and correct a deficiency in retained EU law within devolved competence. The Scottish Government would then send a notification to both the relevant Scottish Parliament subject committee based on its policy remit and the Delegated Powers and Law Reform Committee (DPLRC). This notification would include various points of information, as required by Protocol 1.

Section 8 of the 2018 Act was subject to a sunset clause and therefore a new arrangement would be required to “apply to the exercise by UK Ministers of all powers to make secondary legislation in devolved areas that are currently within the competence of the EU.”⁸

It was agreed, following cross-parliamentary consultation, that Protocol 1 should provide the basis for any new Protocol and subsequently Protocol 2 came into effect on 1 January 2021. There were no substantial changes from the first protocol, and the key points as it relates to this briefing are set out below:

Principles

It is expected that UK Ministers will seek the consent of Scottish Ministers whenever they propose to make secondary legislation containing provisions within devolved competence in relation to matters within the competence of the EU until immediately before IP completion day (31 December 2020 at 11pm). This should apply irrespective of whether there is a statutory obligation on UK Ministers to obtain such consent.

Scope

The scope of this protocol covers secondary legislation to be made by UK Ministers that include provisions that are within devolved competence and relate to matters within the competence of the EU until immediately before IP completion day (31 December 2020 at 11pm). A provision is within

⁸ Protocol on scrutiny by the Scottish Parliament of consent by Scottish Ministers to UK secondary legislation in devolved areas arising from EU Exit <https://www.parliament.scot/-/media/files/committees/statutory-instrument-protocol.pdf>

devolved competence if it would be within paragraph 17 of schedule 2 of EUWA.

Scrutiny process

Type 1 approval process

The Type 1 approval procedure requires the Scottish Government to seek the prior approval of the Scottish Parliament to any proposed decision to grant consent to UK Ministers...In all such cases, the Scottish Government will notify the Scottish Parliament that the Scottish Ministers propose to give their consent to the provision(s) covered by the notification.

Each notification will be accompanied by a letter from the relevant Scottish Minister to the relevant lead subject committee. The notification and letter will also be copied to the Convener of the Delegated Powers and Law Reform Committee.

In responding to Scottish Ministers on the proposed consent decision, the lead committee may make one of four recommendations:

- (a) That the Scottish Ministers should proceed to notify the UK Government of their decision to consent to the provision(s) being included in a UK SI (or UK SIs) to be made by UK Ministers;
- (b) That the Scottish Ministers should not consent to the provision(s) being included in a UK SI (or UK SIs) to be laid solely in the UK Parliament and instead request that the provision(s) be included in a UK SI (or UK SIs) to be made under joint procedure (where that procedure is available);
- (c) That the Scottish Ministers should not consent to the provision(s) being included in a UK SI (or UK SIs) to be made by UK Ministers and instead should consider and formulate an alternative Scottish legislative solution;
- (d) That the Scottish Ministers should not consent to the provision(s) being included in a UK SI (or UK SIs) to be made by UK Ministers and also that they should not take forward an alternative Scottish legislative solution.

In the event that the Scottish Ministers consider that such an alternative solution is unavailable or unviable and do consent to the provision(s) being included in a UK SI contrary to the motion agreed by the Scottish Parliament, the Scottish Ministers will explain the reasons for their chosen course of action to the Scottish Parliament.

Type 2 scrutiny procedure

Type 2 scrutiny procedure enables Scottish Ministers to give consent to UK Ministers without prior approval by the Scottish Parliament.

Where this procedure applies, the Scottish Government will notify each such case to the Scottish Parliament within 5 working days of its having advised the UK Government that they have consented to the proposed provisions.

The Scottish Parliament will consider the Type 2 notification (whether alone or together with other Type 2 notifications) and decide whether to seek more information from the Scottish Government, such as a more detailed explanation of its reasons for granting consent. It will then be for the Scottish Parliament to decide what, if any, further action to take.

Consideration of non-EU SIs

The protocol agreed by the Scottish Parliament and Scottish Government does not apply to SIs created at Westminster but which are non-EU related and this is a gap in scrutiny that has recently gained prominence.

The issue has been raised as part of the work of the Scottish Parliament-Scottish Government Officials' Joint Working Group on Post-Brexit Scrutiny Issues. In correspondence to the Cabinet Secretary of the Scottish Government, the Constitution, Europe, External Affairs and Culture Committee raised the matter of expanding the scope of the protocol as part of a review. It advised that:

The CEEAC Committee and the DPLR Committee both take the general position that the Scottish Parliament should have the opportunity to

scrutinise the exercise of all legislative powers that are within devolved competence...

The DPLR Committee's agreed general position in this regard is:

- a) The Scottish Parliament should have the opportunity to effectively scrutinise the exercise of all legislative powers within devolved competence.
- b) Where such powers are exercised by UK Ministers in devolved areas there is no formal means by which the Scottish Parliament can scrutinise such regulations or be notified that they had been laid before the UK Parliament.
- c) If such powers contain a requirement for the Scottish Ministers' consent when exercised within devolved competence, the Scottish Parliament can scrutinise the Scottish Ministers' consent decision.

The Committee will scrutinise powers conferred on UK Ministers not subject to a requirement for Scottish Ministers' consent, and may suggest matters for the lead committee to consider.

- d) As a minimum, powers when exercised by UK Ministers in devolved areas should be subject to the process set out in the SI Protocol 2 where the power is within the scope of that protocol.⁹

Responding to the committee's letter, the Cabinet Secretary for Constitution, External Affairs and Culture said:

The Scottish Government is clear that, as a matter of principle, the Scottish Parliament should have oversight of the use by UK Ministers of delegated powers in devolved areas. This recognises the Scottish Parliament's responsibility for these matters in Scotland.

⁹ Correspondence from the Constitution, Europe, External Affairs and Culture Committee to the Cabinet Secretary for Constitution, External Affairs and Culture, 30th May 2024: <https://www.parliament.scot/-/media/files/committees/constitution-europe-external-affairs-and-culture-committee/correspondence/2024/convener-to-cab-sec-30524.pdf>

The current protocol (SIP2) shows the potential for non-legislative arrangements to provide the Parliament with the opportunity to scrutinise such secondary legislation. However, to be effective, the protocol, and any extended arrangements beyond its current scope, require the agreement and the cooperation of the UK Government.

The Scottish Government intends to engage with the new UK Government on the issue of UK Ministers' powers in devolved areas, to continue to try to ensure that their use respects devolved responsibilities and provides the Parliament with appropriate levels of transparency and scrutiny. The Scottish Government will keep the Parliament informed about this engagement, which will be in the context of a more general reset of intergovernmental relations, including the Sewel Convention and the IMA exclusions process as set out above.¹⁰

4 Senedd

Unlike the Scottish Parliament, the Senedd has in place Standing Orders that set out how relevant Westminster SIs are to be considered.

However, the origin of the approach of the Senedd also lies in the 2018 Withdrawal Act:

In February 2018, the Constitutional and Legislative Affairs (CLA) Committee of the Fifth Senedd published its report UK governance post-Brexit, which recommended that the Welsh Government enter into an agreement with the Committee to support the scrutiny of intergovernmental activity.

In April 2018, the then Cabinet Secretary for Finance confirmed the Welsh Government's willingness to work with the CLA Committee in developing arrangements enabling the legislature to oversee the actions that will flow

¹⁰ Correspondence from the Cabinet Secretary for Constitution, External Affairs and Culture to the Chair of the Constitution, Europe, External Affairs and Culture Committee, 26th June 2024: <https://www.parliament.scot/-/media/files/committees/constitution-europe-external-affairs-and-culture-committee/correspondence/2024/ceeac-response--postbrexit-scrutiny-issues.pdf>

from the Intergovernmental Agreement on the European Union (Withdrawal) Bill and the Establishment of Common Frameworks.

Following an exchange of correspondence between the CLA Committee and the then Cabinet Secretary for Finance, a formal version of the first Inter-Institutional Relations Agreement (the Agreement) was agreed by the CLA Committee in January 2019.

The CLA Committee laid a report before the Senedd on 31 January which contained the Agreement, and the Senedd formally noted the report and the Agreement on 6 March 2019.¹¹

Following the Senedd election in May 2021 a new Inter-Institutional Relations Agreement between Senedd Cymru and the Welsh Government was drafted and agreed in November 2021. In addition, the First Minister also agreed the following “as regards how the Welsh Ministers will notify the Senedd of when they intend to, or have given, consent to the UK Government exercising a delegated legislative power in a devolved area in relation to Wales”¹²:

I can confirm that the Welsh Government will write to your committee and other relevant committees to inform them of an intention to consent to the UK Government exercising a delegated legislative power in a devolved area in relation to Wales, explaining the rationale for the intention to consent. Where time allows we will provide an opportunity for the Senedd to express a view before consent is formally given. Further, the Welsh Government will lay a Written Statement in relation to every exercise of a delegated legislative power by a UK Minister in a devolved area to which the Welsh Ministers have given consent, explaining the rationale for that consent, normally within three working days of the laying before or notification to the UK Parliament.¹³

¹¹ Inter-Institutional Relations Agreement between Senedd Cymru and the Welsh Government, November 2021: <https://senedd.wales/media/ifdavfn2/cr-ld14674-e.pdf>

¹² As above

¹³ See footnote 11

Standing Order 30A of the Senedd - *Consent in Relation to Statutory Instruments made by UK Ministers* – sets out the process for consideration of relevant statutory instruments. Below is a summary of the process:

- A member of the government must lay a memorandum (“a statutory instrument consent memorandum”) in relation to any relevant statutory instrument laid before the UK Parliament by UK Ministers, normally no later than three days after it is laid before the UK Parliament.
- A statutory instrument consent memorandum must:
 - (i) summarise the objective of the statutory instrument;
 - (ii) specify the extent to which the statutory instrument makes (or would make) relevant provision;
 - (iii) explain whether it is considered appropriate for that provision to be made and for it to be made by means of the statutory instrument;
 - (iv) where a statutory instrument consent memorandum has already been laid in relation to the same provisions in the same statutory instrument set out how and why the new memorandum differs from the previous memorandum.

At the same time as it lays a statutory instrument consent memorandum, the government must also lay the statutory instrument or draft statutory instrument and any supporting material, including Explanatory Memoranda and Regulatory Impact Assessments, prepared by UK Ministers.

Any statutory instrument consent memorandum may be considered by the committee responsible for the functions specified in Standing Order 21.7 (in practice this is the Legislation, Justice and Constitution Committee).

The responsible committee and any other committee considering the memorandum must report to the Senedd within 35 days of the memorandum being laid, unless the Business Committee establishes and publishes a different timetable providing for a longer period.

After a statutory instrument consent memorandum has been laid, any member may, subject to Standing Order 30A.3, table a motion (“a statutory instrument consent motion”) seeking the Senedd’s agreement to the inclusion of a relevant provision in a relevant statutory instrument.

The Senedd must consider a statutory instrument consent motion which has been tabled.¹⁴

An excerpt from a Statutory Instrument Consent Memorandum is reproduced below¹⁵:

STATUTORY INSTRUMENT CONSENT MEMORANDUM

The Social Housing (Regulation) Act 2023 (Consequential and Miscellaneous Amendments) Regulations 2024

1. This Statutory Instrument Consent Memorandum is laid under Standing Order (“SO”) 30A.2. SO30A prescribes that a Statutory Instrument Consent Memorandum must be laid, and a Statutory Instrument Consent Motion may be tabled before Senedd Cymru, if a UK Statutory Instrument makes provision in relation to Wales amending primary legislation within the legislative competence of the Senedd.

2. The Social Housing (Regulation) Act 2023 (Consequential and Miscellaneous Amendments) Regulations 2024 (“the Regulations”) are subject to the affirmative procedure and were laid before the UK Parliament on 18 January 2024 and can be found at:

<https://www.legislation.gov.uk/ukdsi/2024/9780348256420/contents>

3. Copies of the Regulations and associated documentation have today been laid before the Senedd alongside this memorandum.

The text of the correspondence sent from the Minister to the Chair of the Legislation, Justice and Constitution Committee is set out below¹⁶:

¹⁴ Standing Orders of the Senedd: <https://senedd.wales/media/n33df5ry/so-eng.pdf>

¹⁵ Statutory Instrument Consent Memorandum on the Social Housing (Regulation) Act 2023 (Consequential and Miscellaneous Amendments) Regulations 2024: <https://senedd.wales/media/v4ndtxqo/sicm-ld16274-e.pdf>

¹⁶ Correspondence from the Minister for Climate Change to the Chair of the Legislation, Justice and Constitution Committee, 19 January 2024: <https://business.senedd.wales/documents/s144538/LJC6-05-24%20-%20Paper%2025%20-%20Letter%20from%20the%20Minister%20for%20Climate%20Change%2019%20January%202024.pdf>

This letter is to inform you that, in accordance with Standing Order 30A, I have laid a Statutory Instrument Consent Memorandum in the Senedd in respect of the following UK Statutory Instrument:

The Social Housing (Regulation) Act 2023 (Consequential and Miscellaneous Amendments) Regulations 2024

The link to the Statutory Instrument Consent Memorandum can be found [here](#).

I consider the Regulations to be a relevant statutory instrument because they make provision in relation to Wales amending primary legislation, namely the Housing and Regeneration Act 2008, within the legislative competence of the Senedd and which is not an incidental, consequential, transitional, transitory, supplementary or savings provision relating to matters that are not within the legislative competence of the Senedd.

In its 2023/24 annual report, the Legislation, Justice and Constitution Committee set out its role in relation to scrutiny of relevant SIs:

68. Our remit includes the consideration of subordinate legislation made by the UK Government in devolved areas.

69. Invariably, given that Standing Order 30C is now redundant following the expiration of powers in the European (Withdrawal) Act 2018 in December 2022, this means our scrutiny in accordance with Standing Orders is limited to that of Welsh Government statutory instrument consent memoranda (Standing Order 30A). Such memoranda concern subordinate legislation made by UK Ministers that amend primary legislation which makes provision within the legislative competence of the Senedd and which requires the Senedd's consent.

70. In addition, we consider Welsh Government notifications stating that it intends to consent to the UK Government exercising a delegated legislative power in a devolved area in relation to Wales. Such notifications are given to the Committee in accordance with the commitment from the then First Minister, the Rt Hon Mark Drakeford MS, given in November 2021...

Notification of Welsh Government consent to the UK Government exercising a delegated legislative power in a devolved area in relation to Wales

127. We were informed of the Welsh Government's decisions to consent to the UK Government exercising powers in devolved areas in a total of 27

items of delegated legislation. This represents an increase from last year, when we were informed of such powers exercised in respect of 16 items of legislation.

128. Of these 27 items of legislation, we received prior notice of the Welsh Government's intention to consent to 18, which is an increase from last year in percentage terms.¹⁷

¹⁷ Senedd, Legislation, Justice and Constitution Committee, Annual report 2023/24:
<https://senedd.wales/media/ggojnei2/cr-ld16825-e.pdf>